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CLEARINGHOUSE RULE 96-156

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

1. Statutory Authority

a. The rule creates s. HSS 201.135, which provides that, subject to certain exceptions, an individual is not eligible for Aid to Families with Dependent Children (AFDC) if, beginning on the date the individual attained the age of 18 and during which he or she actively participated in the Job Opportunities and Basic Skills (JOBS) Program beginning on or after October 1, 1996, he or she has received AFDC for 60 months. The analysis states that 1995 Wisconsin Act 289 “includes a provision limiting the amount of time an individual may receive AFDC, W-2 [Wisconsin Works] employment position benefits or a combination thereof.”

However, Act 289 does *not* limit the time an individual may receive AFDC. Rather, Act 289 limits the time an individual is eligible for W-2 employment position benefits. Moreover, while the first paragraph of the proposed order cites three provisions as authority for the rule [ss. 49.145 (2) (n) and 49.50 (2), Stats., and SECTION 275 (3) of Act 289], none of these three provisions provides statutory authority to impose a time limit on AFDC benefits. As for the three provisions cited:

- (1) Section 49.145 (2) (n), Stats. (which was created by Act 289 and which is specified as the statute interpreted by the rule), establishes one of the nonfinancial eligibility criteria for *W-2 employment positions and W-2 job access loans* by providing that an individual is eligible for these if the total number of months the individual has actively participated in the JOBS program on or after July 1, 1996, or held a W-2 employment position, or both, does not exceed 60 months. *Section 49.145 (2) (n), Stats., does not limit the amount of time an individual is eligible for AFDC.*

- (2) Section 49.50 (2), Stats., which was renumbered to s. 49.33 (4), Stats., by 1995 Wisconsin Act 27, authorizes the department to promulgate rules for the **administration** of AFDC. It does not authorize the department to impose a time limit on AFDC benefits.
- (3) SECTION 275 (3) of Act 289 authorizes the department to promulgate rules for the **administration** of the **W-2 program, not AFDC**.

Neither s. 49.145 (2) (n), Stats., nor any other provision of the Wisconsin statutes authorizes imposing a time limit on AFDC benefits, other than for purposes of the Work-Not-Welfare (WNW) demonstration project. In addition to the fact that there is no statutory authority to impose the proposed time limit on AFDC benefits, the rule would be moot even if it were created. The rule would impose a 60-month time limit on AFDC counting, at the earliest, from October 1, 1996. However, since 1993 Wisconsin Act 99 provides that AFDC will be repealed on January 1, 1999 and since Act 289 provides that the W-2 program will replace AFDC before that date, a person could never receive 60 months of AFDC benefits after October 1, 1996. Thus, the time limit on receipt of AFDC created by the rule could never be imposed with respect to AFDC.

Other problems inherent in the rule also evidence the lack of statutory authority to impose a time limit on AFDC benefits. Examples include the following:

- (1) Section HSS 201.135 (2) (intro.) provides that an “agency” may extend the 60-month time limit under unusual circumstances. In s. HSS 201.03 (4), “agency” is defined as the county department of social services or human services, or a tribal agency that administers economic support programs. That definition would apply to s. HSS 201.135. However, s. 49.145 (2) (n), Stats., provides that it is the **W-2 agency** that determines if unusual circumstances exist that warrant an extension of the 60-month time limit on eligibility for a W-2 employment position.
- (2) Section HSS 201.135 (2) (b) 1. and 2. refer to “unsubsidized employment.” However, that term is not defined in ch. HSS 201. Rather, “unsubsidized employment” is a term defined in s. 49.147 (1) (a), Stats., for purposes of the **W-2 program**, not the AFDC program.

b. Section 49.145 (2) (n), Stats., provides that participation in the JOBS program begins to count toward the 60-month time limit on eligibility **for W-2 employment positions** beginning on **July 1, 1996**. In contrast, s. HSS 201.135 (1) provides that participation in the JOBS program begins to count toward the 60-month time limit on eligibility **for AFDC** beginning on **October 1, 1996**. Again, as discussed above, there is no statutory authority for the time limit on AFDC benefits. However, even if s. 49.145 (2) (n), Stats., were interpreted as providing such authority, it does not authorize beginning counting JOBS participation from October 1, 1996. It clearly provides for counting participation in the JOBS program beginning July 1, 1996. There is no statutory authority for using October 1, 1996 as the beginning date for counting months of JOBS participation for any purpose, much less for the purpose of limiting AFDC benefits. (The Federal Temporary Assistance for Needy Families (TANF) program, which provides that a state may not use any part of the TANF grant to provide assistance to a family that includes an adult

who has received assistance for 60 months under a state program funded by the TANF block grant, does not, in and of itself, amend Wisconsin statutes regarding public assistance benefits available. In particular, it does not amend the date specified in s. 49.145 (2) (n), Stats., that is, July 1, 1996, not October 1, 1996.)

c. Assuming for the sake of argument that there were statutory authority to impose a time limit on AFDC benefits, what provides statutory authority for the exemption of certain persons as set forth in s. HSS 201.135 (5)?

2. Form, Style and Placement in Administrative Code

a. Throughout the rule, a space should be left between “s.” and “HSS” in cross-references.

b. In s. HSS 201.135 (2) (intro.), “any of the following” should be inserted before the colon. Paragraphs (a) and (b) 1. and 2. should all end with periods rather than a semicolon or “; or”. [s. 1.03 (intro.), Manual.]

c. The definition in s. HSS 201.135 (2) (c) should begin “In this paragraph,”. [s. 1.01 (7) (a), Manual.] In the alternative, the two sentences could be combined as follows: “(c) The adult . . . preclude finding a job that pays”

d. In s. HSS 201.135 (5) (c), “Learnfare” should be lowercase.

4. Adequacy of References to Related Statutes, Rules and Forms

a. In the first paragraph of the proposed order, the reference to s. 49.50 (2), Stats., should be changed to s. 49.33 (4), Stats., as it was renumbered by 1995 Wisconsin Act 27.

b. In s. HSS 201.135 (1), the reference to “s. HSS 206” should be changed to “ch. HSS 206”.

c. Section HSS 201.135 (5) creates an exception to the 60-month time limit in s. HSS 201.135 (1) by listing individuals who are not subject to s. HSS 201.135 (1). Section HSS 201.135 (1) should refer to this exception, for example, by including the language such as the following as its introductory clause: “Except as provided in sub. (5), an individual is not eligible for”

d. Section HSS 201.135 (4) refers to s. HSS 201.19 (2m). That subsection does not currently exist. This citation should be reviewed for accuracy.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. Section HSS 201.135 (2) (a) refers to a “JOBS program participant who is unable to work because of personal disability or incapacity, as defined under s. HSS 207.11 (1) (a).” However, s. HSS 207.11 (1) (a) does not “define” either of those terms. Instead, s. HSS 207.11

(1) (a) refers to a person who is “[i]ncapacitated, ill or injured with a medically-determined physical or mental impairment which prevents the person from temporarily or permanently participating in WNW employment or training activities.” Section HSS 207.11 (1) (a) also sets forth requirements regarding reexamination by a physician.

The rule should be clarified to eliminate the ambiguity created by the use of terms which are somewhat different and to address questions regarding whether conditions imposed by s. HSS 207.11 (such as reexamination) would also apply to s. HSS 201.135 (2) (a). Also, is there a reason that the reference was not to s. HSS 201.19 (1) (g), which sets forth almost identical provisions with respect to who is exempt from JOBS participation?

Moreover, considering that s. HSS 201.19 (1) (g) exempts these disabled individuals from participating in JOBS, how can the person be a “JOBS program participant”? “Participant” is defined for purposes of the JOBS program in s. HSS 206.03 (25) and includes only those persons assigned to a JOBS program activity. Although the phrase “JOBS program participant” is not defined in s. HSS 201.135, it (or a variation of it) is used several times in s. HSS 201.135. In s. HSS 201.135, it appears to refer to persons who enrolled in JOBS under s. HSS 206.07, even if they are exempt from participation under s. HSS 201.19. Thus, it appears to have a different meaning than “participant” in s. HSS 206.03 (25). Because of the potential for confusion, it would be useful to define the term “JOBS program participant” for purposes of s. HSS 201.135. In the alternative, should “enrollee” be used in s. HSS 201.135 with a cross-reference to the definition of that term in s. HSS 206.03 (16)?

Moreover, the inconsistent use of terms creates ambiguity. For example, s. HSS 201.135 (2) (b) (intro.) and 1. and (4) refer to “JOBS program participant”; s. HSS 201.135 (2) (b) 2. refers to “JOBS participant”; s. HSS 201.135 (2) (c) refers to “adult JOBS participants” and s. HSS 201.135 (5) (b) refers to “participant.” One term should be selected, defined and used consistently.

b. Section HSS 201.135 (2) (a) refers to a JOBS program participant who “is needed as determined under s. HSS 201.19 (1) (i) to remain at home to care for another member of the household whose incapacity is so severe that without constant in-home care provided by the JOBS program participant, the incapacitated AFDC group member’s health and well-being would be significantly affected.” However, s. HSS 201.19 (1) (i) simply refers to an AFDC recipient who is “[n]eeded, as determined by the agency, to remain at home to look after another member of the household because of that person’s medical condition.” Because of the additional language in s. HSS 201.135 (2) (a), it is not clear if the test under s. HSS 201.135 (2) (a) is intended to be identical to the test under s. HSS 201.19 (1) (i). This should be clarified.

Moreover, considering that s. HSS 201.19 (1) (i) exempts these people from participating in JOBS, the question with respect to defining them as “JOBS program participants” is also pertinent. (See comment 5. b.)

c. Section HSS 201.135 (2) (c) provides that “participants have . . . and are” In order to be consistent with the remainder of s. HSS 201.135 (2), the singular form should be used, that is, “participant has . . . and is”

d. Section HSS 201.135 (1) refers to a “60-month limit”; s. HSS 201.135 (2) refers to a “60 month time limit”; and s. HSS 201.135 (3) refers to a “60 month lifetime limit.” In order to

avoid ambiguity, one term should be selected and used consistently. The term selected should have a hyphen between “60” and “month.”

e. The word “A” should be inserted preceding the word “Dependent” in s. HSS 201.135 (5) (a), and “Dependent” should not be capitalized.

f. Section HSS 201.135 (5) (b) refers to a participant “enrolled in JOBS control pay for performance (PFP) under s. HSS 201.045 (4) (b) 1.” It would be clearer if this referred to a participant “enrolled in a JOBS pay for performance control group under s. HSS 201.045 (4) (b) 1.” The parenthetical term should be deleted here and in s. HSS 201.135 (2) (b) 1.